

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

**NATIONAL BOARD OF MEDICAL
EXAMINERS *et al.*,**

Plaintiffs,

V.

OPTIMA UNIVERSITY LLC *et al.*,

Defendants.

Civil Action No. 09-1043-JDB

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR LEAVE TO TAKE DISCOVERY**

Plaintiffs the National Board of Medical Examiners and the Federation of State Medical Boards seek to take third-party discovery in advance of the parties' Rule 26 conference.

Plaintiffs filed their complaint against Defendants on February 23, 2009. That same day, the Court granted Plaintiffs' *ex parte* motion to seize and impound test preparation course materials in Defendants' custody and control. The materials in question include materials that Plaintiffs believe infringe their copyrights in the United States Medical Licensing Examination ("USMLE"). Plaintiffs conducted the seizure on February 24, 2009. Although they were able to obtain some materials, their efforts were significantly impeded by Defendants' failure to follow the Court's Order and provide passwords necessary to access electronic data in Defendants' custody and control. Plaintiffs have therefore filed a separate motion that seeks to hold Defendants in

contempt of Court. *See* Plaintiffs' Status Report and Emergency Motion for an Order Requiring Defendants to Show Cause (filed concurrently herewith).

Under normal circumstances, "[a] party may not seek discovery from any source before the parties have conferred as required by [Federal Rule of Civil Procedure] 26(f)." Fed. R. Civ. P. 26(d)(1). This timing may be amended by court order. *See id.* Plaintiffs seek to initiate third-party discovery in advance of any Rule 26(f) conference because of heightened concerns regarding the Defendants' activities and the importance of the public interest that is ultimately at stake in this litigation. Plaintiffs will seek information from third parties that is relevant to their copyright infringement claims and to their efforts to protect the integrity of the USMLE and the licensing process for physicians in the United States, including information relating to actions Defendants have taken in conducting their USMLE programs, individuals who have participated in the Optima review programs, and the identity of the John Doe defendants.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and permit Plaintiffs to begin taking third-party discovery immediately.

Dated: March 4, 2009.

Respectfully submitted,

s/ Russell E. Reviere

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following via U.S. Mail postage prepaid on March 5, 2009 (with a courtesy copy of this Pleading sent to Defendant's Counsel at jbradberriesq@citlink.net):

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